Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

BELLECOURT, ET AL.,

Petitioners,

v.

CITY OF CLEVELAND,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's rulings in *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. O'Brien*, 391 U.S. 367 (1968) permit a municipality to invoke a fire safety justification as the basis for arresting and incarcerating any speaker who burns an object in effigy, no matter how small or brief the fire, no matter how minor the threat to public safety.

2. Whether a city's fire safety justification permits the arrest and incarceration of demonstrators, under an aggravated arson statute, for gathering outside a baseball stadium to protest and burn the Cleveland Indians' logo, "Chief Wahoo" – on a record in which there were no credible concerns about fire safety because the protesters were cordoned off from the public by metal barricades and were surrounded by six firefighters, who quickly doused the meager flames with fire extinguishers.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court in this proceeding.

OPINIONS BELOW

The opinion of the Ohio Supreme Court, review of which is sought by this petition, is reported as *Bellecourt v. City of Cleveland*, 104 Ohio St. 3d 439, 820 N.E.2d 309 (Ohio 2004) (hereinafter, "the Opinion"). It is reprinted in the appendix to this petition at page App. 1. The Opinion reversed a decision by Ohio's Eighth District Court of Appeals, which is reported at 152 Ohio App. 3d 687, 789 N.E.2d 1133 (Ohio Ct. App. 2003) and is reprinted at App. 12.

JURISDICTION

The Ohio Supreme Court's Opinion was issued on December 15, 2004. *See* App. 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE STATUTE AT ISSUE

Petitioners were arrested for the offense of aggravated arson, in violation of Ohio Revised Code § 2909.02. That statute is reprinted at App. 31.

STATEMENT OF THE CASE

On April 10, 1998, the Petitioners[1] were arrested by officers of the Cleveland Police Department following a demonstration outside Jacobs Field, where the Cleveland Indians were about to play the opening game of the baseball season. The Petitioners gathered at Jacobs Field to protest the baseball team's use of a Native American

[1] Vernon Bellecourt, Juan Reyna, James Watson, Charlene Teters, and Zizwe Tchiquka.

caricature, "Chief Wahoo," as its symbol and the use of "Cleveland Indians" as its name. The demonstration involved a march to Jacobs Field with hand-held signs, followed by speeches that protested the use of racist caricatures and symbols. These speeches culminated in the burning of two effigies: Chief Wahoo and Black Sambo. Officials of the City of Cleveland knew that there would be protests, and possibly the burning of effigies, that day. (Tr. 238.)

Petitioners gathered in a federally designated free speech zone on public land outside the stadium, which was paved and cordoned off with metal barricades. There were no fans – only protesters – inside the free speech zone. (Tr. 81-83, 288.) Also stationed inside the barricades were "peacekeepers" from the City's community relations department, police officers, and fire officials holding fire extinguishers. (Tr. 84, 103.) It was here, inside the barricades and separated from the public, that Petitioners burned the effigies, which were made from clothing and newspaper. At no point prior to the lighting of the effigies did safety officials indicate to the protesters that they felt it was unsafe to burn the effigies that day, nor was any warning given that arrests would be made if the effigies were lit. (Tr. 118, 125.)

At one point after the first effigy was lit, a small piece of burning material fell to the ground, blowing no more than a few feet, and came to rest near the foot of one Petitioner. (Tr. 146, 157.) The effigy burned for about 20 to 30 seconds before being extinguished by two of the firefighters. Immediately three Petitioners were arrested. (Tr. 248.) A second effigy was lit and instantly extinguished, resulting in the immediate arrest of the remaining Petitioners. All Petitioners were handcuffed, placed in a police

van for about one hour, and ultimately taken to the Cleveland Police headquarters, where they were held for more than 24 hours. Although they had been arrested for the offense of aggravated arson, in violation of Ohio Revised Code § 2909.02, all of the Petitioners were released without any formal charges ever filed against them. (Tr. 81, 82, 86-93, 144-48, 151-53, 167-68, 201-08, 312, 318, 327-29, 331-33, 385.)

On April 9, 1999, Petitioners filed suit in the Common Pleas Court of Cuyahoga County, Ohio against the City of Cleveland, the Cleveland police chief, and various individual officers, claiming the Defendants violated their rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution and their rights to freedom of speech and freedom from unreasonable seizure and arrest under the Ohio Constitution.

On April 6, 2001, the case against the City of Cleveland went to trial. During the course of that trial, a videotape of the effigy burning was played for the jury, and witnesses testified as to the conduct of the police, the firefighters, and the Petitioners. The jury also heard testimony about the weather conditions when the effigies were lit and the extent of the fire. Following the close of all evidence on August 7, 2001, the trial court granted a directed verdict for the government on the grounds that the police had probable cause to arrest the Petitioners. The judgment was appealed.

On May 15, 2003, Ohio's Eighth District Court of Appeals reversed the trial court's decisions to grant a motion in limine and to grant the motion for directed verdict in favor of the City of Cleveland. (App. 12.) The Court of Appeals concluded that:

(1) The conduct of the Petitioners was protected expression under the First Amendment.

(2) The City had failed to assert a sufficient interest in public safety to justify its interference with the Petitioners' exercise of free speech.

(3) There was sufficient evidence to raise a jury question regarding the liability of the City for its failure to adequately train its safety forces in proper responses to demonstrations involving the burning of effigies.

(4) The trial court improperly excluded evidence that some of the Petitioners had previously been arrested by Cleveland police for effigy burning at Jacobs Field.

(5) The trial court improperly directed a verdict in favor of the City.[2]

The City of Cleveland appealed to the Ohio Supreme Court. This appeal focused on the ruling of the Court of Appeals that reversed the trial court's grant of a directed verdict in favor of the City.[3] On December 15, 2004, the Ohio Supreme Court reversed the decision of the Court of Appeals, holding that Petitioners' actions in burning the effigies on a concrete surface cordoned off from the public by metal barricades constituted a safety hazard, making

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[2] The claim against the Chief of Police, Rocco Pollutro, a defendant in the original action, was not challenged in the appeal, which focused on the First Amendment claim as it applied to the City of Cleveland pursuant to *Monell v. Department of Social Services*, 438 U.S. 658 (1978).

[3] The City did not appeal the reversal of the grant of the motion in limine.

their arrests constitutional and the directed verdict appropriate. (App. 1.)[4]

Petitioners now appeal the decision of the Ohio Supreme Court, submitting this petition for certiorari and requesting that this Honorable Court consent to hear arguments on the merits of the case.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Deciding an Important Question of Federal Free Speech Law, the Ohio Supreme Court Has Recognized a "Fire Safety" Justification So Easy To Invoke That it May Be Used To Punish Virtually Every Instance of Flag Burning and Effigy Burning – Thereby Undercutting This Court's Decision in *Texas v. Johnson* and Creating a Question of First Impression That Requires This Court's Review and Correction.

At stake in this case is the continued vitality of *Texas v. Johnson*, 491 U.S. 397 (1989) as affording a meaningful right to burn flags and effigies as an act of symbolic expression. Does that right really exist if it can only be exercised at the cost of immediate arrest and incarceration? If allowed to stand, the Ohio Supreme Court's Opinion provides easy immunity for State retaliation against those who burn flags or effigies. The Opinion achieves this result by reducing the intermediate scrutiny required by *United States v. O'Brien*, 391 U.S. 367 (1968) to something

[4] The Ohio Supreme Court was split 5-2, with Chief Justice Moyer (App. 8) and Justice Pfeifer (App. 10) dissenting in separate opinions.

far less than rational basis review. It allows municipalities to adopt an exaggerated "public safety" response to the meager little fires that so often accompany the burning of flags and effigies. It defers to the whims of police officers who decide that simply extinguishing the fire is insufficient to protect the public – and who decide, without any basis in the statutory language (App. 8-9), that they have just witnessed an act of aggravated arson, warranting the immediate arrest and incarceration of the protesters.

Writing in dissent, Ohio Supreme Court Justice Paul Pfeifer observed:

> [C]eremonial burning is protected speech in this country. But every state has prohibitions against arson. To allow arson laws to be applied to small-scale, outdoor ceremonial burnings like the one in this case defeats the free-speech protections accorded those activities.

(App. 10.)

Also in dissent, the Chief Justice of the Ohio Supreme Court, Thomas Moyer, asserted that Petitioners did not come close to violating the aggravated arson statute under which they were arrested. (App. 8-9.) Having used the statute to arrest and jail the Petitioners, the City never attempted to prosecute them under it.

Transforming *O'Brien* into a standard of utter deference, the Opinion conludes that arresting and jailing Petitioners was merely an "incidental" restriction (App. 3-4) that was "narrowly tailored" to the preservation of public safety (App. 7). Ultimately, these arrests were fully justified under *O'Brien* "because of a perceived public safety threat" by the police (App. 7). If protesters can be

arrested and jailed every time a police officer "perceive[s]" a "public safety threat" in the burning of a flag or effigy, then the fate of *Texas v. Johnson* will hinge largely on its popularity among police officers.

This is the key danger of the Opinion: It uses *O'Brien* to set up an invincible fire safety justification so easy for the State to invoke that it can be used to punish virtually every instance of flag burning and effigy burning.

If a substantial threat to fire safety may be found *on this record*, then it will be present every time a flag or effigy is burned. The Petitioners here were cordoned off behind metal barricades. Pedestrians were re-routed away from the area where the protest took place. Inside the barricades, the protesters were situated on a concrete surface. Other than the effigies, there were no flammable objects in the area. Finally, six Cleveland firefighters armed with fire extinguishers were inside the barricades, ready to intervene if the fire grew out of control. It never did. One fragment of burning material floated to the ground near one of the protesters. That was the danger "highlight" of this event. It is simply *not* a factual record that features any legitimate threat to public safety. But the Opinion readily concludes that the police, having "perceived" a "public safety threat," were free to arrest and jail the Petitioners. (App. 7.) If protesters may be arrested and incarcerated under these circumstances, then the same punishment will always await the symbolic burning of flags and effigies.

Thus, the Opinion has created a fire safety exception to *Texas v. Johnson* so easy to invoke that it effectively overrules that decision. Under the Opinion, police are free to arrest and jail anyone who burns a flag or an effigy, so

long as they "perceive" the requisite "threat" to public safety (App. 7). And in making that arrest, police are even free to invoke a fire safety law that is facially *inapplicable* to the situation (App. 8-9). The Opinion thereby presents a question of first impression that requires this Court's review and correction.

The Opinion assures us that Petitioners were not arrested for exercising a constitutional right (App. 5). But the fact that they were arrested under an aggravated arson statute that was not remotely applicable to the situation (App. 8-9) raises a genuine question about the City's *real* reason for arresting them. If "fire safety" really *was* the main concern, why was it necessary to arrest and incarcerate the Petitioners once the effigies had been doused? Any "threat" to public safety ended with the dousing of the flames. When it took the extra steps of arresting and jailing the Petitioners, the City was no longer acting in the service of fire safety. It was punishing the Petitioners for exercising their rights under *Texas v. Johnson*. But the Opinion blithely accepts the City's "fire safety" justification for those arrests. It is untroubled by, and unwilling to examine, the lack of consistency between what the City actually *did* here and how it has sought to *justify* its actions.

This is another reason for granting review: When examining restrictions on expressive conduct, this Court has never authorized the blind acceptance of any justification that the government offers.[5] When, as here, there is a

[5] *See, e.g., Martin v. City of Struthers*, 319 U.S. 141 (1943) (striking down an outright ban on all door-to-door leafleting). Though the ordinance was justified in large part as a crime control measure designed to prevent burglaries, *id.* at 144, this Court did not hestitate

(Continued on following page)

lack of consistency between the government's regulatory conduct and its proffered justification, *some* level of judicial skepticism is in order. By reducing *O'Brien* from intermediate scrutiny to utterly deferential review, the Opinion cries out for this Court's correction.

Finally, under this Court's precedents, free speech rights are not so easily trumped (as they were here) by "the state's interest in maintaining order." (App. 5.) For more than sixty years, this Court has carefully nurtured the protections for expressive freedom, allowing their exercise even at considerable risk of public disorder.[6] In

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to peer behind the asserted governmental justification, where it found an illegitimate regulatory purpose, *id.* at 147: "[Because] the dangers of distribution can so easily be controlled by traditional legal methods, [the challenged ordinance] can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."

[6] *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."); *Street v. New York*, 394 U.S. 576, 593 (1969) (overturning a flag-burning conviction) ("'[F]reedom to be intellectually . . . diverse or even contrary'" must be upheld regardless of any "'fear that [such] freedom . . . will disintegrate the social organization.'") (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943)); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (overturning a flag-burning conviction) (holding that "the government may [not] ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence," nor may it "assume that every expression of a provocative idea will incite a riot"); *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."); *Coates v. City of Cincinnati*,

(Continued on following page)

sharp contrast to this Court's precedents, the Opinion elevates the preservation of public order to an overriding governmental interest that easily trumps the exercise of well-established First Amendment freedoms. Under the Opinion, maintaining public order is so important that judges must defer even to the arrest of protesters under statutes that *do not apply* to their conduct. By sacrificing the speech rights enshrined in *Texas v. Johnson* – and making their exercise readily subject to arrest and incarceration – the Opinion is a direct affront to this Court's authority. Accordingly, the Opinion urgently requires this Court's review.

CONCLUSION

Producing a question of first impression, the Ohio Supreme Court has created a "fire safety" exception to *Texas v. Johnson* so easy to invoke that it may be used by the State to punish virtually every instance of flag burning and effigy burning. If allowed to stand, the Opinion will serve as an invitation to local governments to ban, under the guise of "fire safety," the expressive freedoms that this Court established in *Texas v. Johnson*.

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402 U.S. 611, 615 (1971) (holding that "public intolerance or animosity" cannot be the basis for governmental restrictions on First Amendment freedoms); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508-09 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength. . . .").

Accordingly, Petitioners request that this Court either grant their petition for a writ of certiorari or summarily reverse the ruling below.

Respectfully submitted,

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SUPREME COURT OF OHIO

BELLECOURT ET AL., APPELLEES v. CITY OF CLEVELAND, APPELLANT

[Cite as *Bellecourt v. Cleveland*, 104 Ohio St.3d 439, 2004-Ohio-6551.]

Civil rights – Section 1983, Title 42, U.S. Code – Right to free speech not violated by arrest after burning effigy where municipality's interest in preserving public safety is implicated.

(No. 2003-1202 – Submitted May 26, 2004 – Decided December 15, 2004.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 80193, 152 Ohio App.3d 687, 2003-Ohio-2468.

O'CONNOR, J.

{¶ 1} April 10, 1998, opening day for the Cleveland Indians baseball team, was a blustery day in downtown Cleveland. Among the onlookers near Jacobs Field, the Indians' ballpark, were throngs of cheering fans as well as groups of spirited protestors. The protestors, including appellees Vernon Bellecourt, Juan Reyna, James Watson, Charlene Teters, and Zizwe Tchiquka, perceived the team's moniker and Chief Wahoo logo as disparaging to Native American culture.[1]

{¶ 2} Following animated yet peaceful speeches and marches, the protestors entered a cordoned area near

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[1] The Chief Wahoo logo is a red-faced, hooked-nosed, grinning caricature of a Native American.

Jacobs Field. In the presence of several safety personnel, the protestors doused a newspaper-stuffed effigy of Chief Wahoo with lighter fluid and set it afire. As the fire struggled to spread, Bellecourt sprayed additional lighter fluid on the effigy. The fire then quickly accelerated, and within seconds the effigy disintegrated, sending burning remnants to the sidewalk. Cleveland police extinguished what remained of the fire and arrested Bellecourt, Tchiquka, and Reyna. Shortly thereafter, Watson and Teters ignited an accelerant-soaked effigy of Little Black Sambo – apparently as an emblematic condemnation of the use of racially offensive symbols. Police then arrested Watson and Teters. Though appellant, the city of Cleveland, booked appellees on charges of aggravated arson and detained appellees overnight, the city did not prosecute appellees for violating any law.

{¶ 3} Pursuant to Section 1983, Title 42, U.S.Code, appellees sued the city, the arresting officers and their commander, David Regetz, and Chief of Police Rocco Pollutro for civil-rights violations stemming from their allegedly baseless arrest and detention. Upon motions for summary judgment, the trial court dismissed the claims against the arresting officers and their commander. The claims against the city and Chief Pollutro were submitted to a jury. In defense, Cleveland and Pollutro argued that police arrested appellees not for burning the effigies, per se, but for burning the effigies in a manner that threatened public safety. Following the presentation of evidence, the court directed a verdict in favor of Cleveland and Pollutro. The appellate court affirmed the judgment in favor of Pollutro and reversed the judgment in favor of Cleveland. The court resolved the claims against the arresting officers and their commander on procedural

grounds that have not been presented for our review. This cause is now before us pursuant to our acceptance of Cleveland's discretionary appeal.

{¶ 4} Our ultimate inquiry is whether Cleveland is liable to appellees pursuant to Section 1983, Title 42, U.S.Code, for violating their constitutional right to free speech. Such liability will attach to a municipality only if the municipality itself has inflicted a constitutionally significant injury by executing a policy or custom. *Monell v. New York City Dept. of Social Serv.* (1978), 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611. Because a violation of a constitutional right is prerequisite to a Section 1983 violation, our threshold inquiry is whether Cleveland violated appellees' constitutional right to free speech. See *Flagg Bros., Inc. v. Brooks* (1978), 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185. If so, we would then proceed to resolve whether a Cleveland policy or custom was the "'moving force [behind] the constitutional violation.'" *Canton v. Harris* (1989), 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412, quoting *Monell,* 436 U.S. at 694, 98 S.Ct. 2018, 56 L.Ed.2d 611.

{¶ 5} Without question, the effigy burnings were constitutionally protected speech. See *Texas v. Johnson* (1989), 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342. Moreover, appellees concede, and we agree, that extinguishment of the waning flames after the effigies had disintegrated does not raise an issue of constitutional significance because by that time the protected speech had concluded. Appellees urge, however, that the right to free speech is hollow if it is exercised at the expense of arrest. Though we generally agree with this proposition, we find it inapplicable here because any suppression of speech was incidental to Cleveland's important interest in preventing

harm caused by fire. See id., 491 U.S. at 407, 109 S.Ct. 2533, 105 L.Ed.2d 342.

{¶ 6} When speech and nonspeech elements are part of the same course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien* (1968), 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672. A regulation is sufficiently justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377, 88 S.Ct. 1673, 20 L.Ed.2d 672.

{¶ 7} The threshold issue to *O'Brien*'s test is whether a governmental interest asserted by Cleveland is implicated on the facts before us. See *Texas v. Johnson*, 491 U.S. at 407, 109 S.Ct. 2533, 105 L.Ed.2d 342. If the city has not asserted a pertinent interest, then we cannot apply *O'Brien*'s test, and the city has failed to justify its infringement upon appellees' right to free speech. See id.

{¶ 8} In *Johnson*, Texas claimed, in part, that its interest in preventing breaches of the peace justified arresting Johnson for burning an American flag. The Supreme Court held that this interest was insufficient because "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag." Id., 491 U.S. at 408, 109 S.Ct. 2533, 105 L.Ed.2d 342. Moreover, there was no indication that Johnson's provocative speech was intended to incite or likely to incite

lawless conduct. Id. at 409, 109 S.Ct. 2533, 105 L.Ed.2d 342, citing *Brandenburg v. Ohio* (1969), 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430. In sum, Johnson was arrested for exercising a constitutional right, not for conduct that threatened the state's interest in maintaining order.

{¶ 9} As in *Johnson*, the conduct in question here involved expression via the burning of a symbol. Unlike *Johnson*, however, the facts here indicate that Cleveland's asserted interest in preserving public safety was implicated. In the judgment of Cleveland's police officers, the windy conditions coupled with the spraying of additional accelerant on the already burning effigies created a hazard, which was their responsibility to remedy. Though appellees emphasize that they set the fire in a cordoned area devoid of flammable property, the police were obligated to protect the public, including the protestors themselves. A video of the effigy burnings and arrests is part of our record. It shows a protestor spraying accelerant on a burning effigy and then retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began floating in the wind and landing in the proximity of the protestors. These facts implicate Cleveland's asserted interest in public safety.

{¶ 10} Having determined that a governmental interest was implicated on the facts before us, we now apply *O'Brien*'s test to determine whether that interest justified an infringement upon appellees' freedom of speech. The parties do not dispute, nor do we question, that safety regulations are within Cleveland's constitutional powers or that such regulation furthers an important or substantial government interest that is generally

unrelated to the suppression of free expression. Therefore, the first three prongs of *O'Brien*'s test are satisfied.

{¶ 11} Appellees assert, however, that their arrests were not essential to further Cleveland's safety interest. In support of their position, appellees argue that prior to arrest, police should have warned them of dangers inherent to burning effigies or that the burnings would result in their arrests. In effect, appellees argue that the city erred by forgoing the lesser restriction of warnings in favor of the greater restriction of arrests.

{¶ 12} The success of appellees' argument depends on the applicability of strict scrutiny, the highest level of constitutional analysis. Here, however, our analysis is based on *O'Brien*'s relatively lenient standard that "is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence* (1984), 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221. In *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, the Supreme Court rejected the "less restrictive means" argument as inapplicable to *O'Brien*'s test. Quoting *Clark* at 299, 104 S.Ct. 3065, 82 L.Ed.2d 221, the *Ward* court stated, "'We do not believe * * * that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the [United States Park Service] as the manager of the [Nation's] parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.'" Id., 491 U.S. at 798, 109 S.Ct. 2746, 105 L.Ed.2d 661. Though the *Ward* court spoke specifically to the regulation of parks, the unmistakable message is that under *O'Brien*'s standard, courts are not arbiters of whether a less restrictive means exists to

effectuate an asserted governmental interest. The *Ward* court continued, "Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. * * * [T]he regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." Id., 491 U.S. at 798-800, 109 S.Ct. 2746, 105 L.Ed.2d 661. Thus, appellees' "less restrictive means" argument is without merit.

{¶ 13} Further, appellees' argument presumes that warnings would have obviated a fire hazard or that they were arrested merely for burning effigies. To be certain, the police knew that protestors intended to burn effigies. There is no indication, however, that the police had prior knowledge of the dangerous manner in which the effigies were to be burned, and it would be utterly impractical to require police to be so prescient as to issue appropriate warnings. Moreover, the record demonstrates that Cleveland arrested appellees not because they burned effigies, but because of a perceived public safety threat in the manner in which they burned the effigies. Under the facts before us, we determine that the arrests were narrowly tailored to Cleveland's asserted interest in preserving public safety. Therefore, the fourth prong of *O'Brien*'s test is satisfied, and any incidental limitation on appellees' First Amendment freedoms was justified. Accordingly, Cleveland is not liable to appellees pursuant to Section 1983, Title 42, U.S.Code.

Judgment reversed.

RESNICK, F. E. SWEENEY and LUNDBERG STRATTON, JJ., concur.

O'DONNELL, J., concurs in judgment only.

MOYER, C.J., dissents.

PFEIFER, J., dissents.

MOYER, C.J., dissenting.

{¶ 14} Appellees were arrested for violating R.C. 2909.02, which provides:

{¶ 15} "(A) No person, by means of fire or explosion, shall knowingly do any of the following:

{¶ 16} "(1) Create a substantial risk of serious physical harm to any person other than the offender;

{¶ 17} "(2) Cause physical harm to any occupied structure."

{¶ 18} In order for appellees to succeed in this Section 1983 claim, they must prove that their arrests violated their right to free speech and that a policy of the city caused the violations. *Canton v. Harris* (1989), 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412.

{¶ 19} The majority concludes that the facts implicate the city's interest in public safety, placing significance on the fact that pieces of the burned effigy "land[ed] in the proximity of the protesters." However, because the protesters were charged with violating R.C. 2909.02, the city's sole interest in this particular case was to protect "any person other than the offender" or "any occupied structure." The effigies were burned outdoors in a paved area

cordoned off by metal barricades, and firefighters with extinguishers were nearby. The most one can conclude is that appellees placed themselves at "a substantial risk of serious physical harm." Even though one might be concerned with the potential danger of burning effigies, there is no evidence that anyone other than the protesters were placed in any risk of serious physical harm resulting from appellees' conduct. Therefore, the city had no authority to arrest appellees based on R.C. 2909.02, and the arrests interfered with their freedom of expression guaranteed by the First Amendment.

{¶ 20} In support of their contention that a policy of the city caused the constitutional violations, appellees assert that the city failed to adequately train its police officers how to respond to protesters who burn effigies. Under the "failure to train" theory, a city can be held liable for a violation of constitutional rights by one of its police officers, pursuant to Section 1983, "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Canton,* 489 U.S. at 388, 109 S.Ct. 1197, 103 L.Ed.2d 412. Deliberate indifference may be shown where the need for more or different training is obvious and where "the inadequacy [is] likely to result in the violation of constitutional rights." Id. at 390, 109 S.Ct. 1197, 103 L.Ed.2d 412.

{¶ 21} At trial, appellees offered evidence that they previously had been arrested for burning effigies at Jacobs Field. Appellees also elicited testimony from Cleveland police and fire department personnel that the city had not conducted special training on the constitutional implications of responding to symbolic burnings. Appellees have presented evidence upon which a reasonable jury could determine that the city was deliberately indifferent to

individuals' constitutional rights. Accordingly, I believe that the court of appeals properly reversed the judgment of the trial court and remanded the cause for determination whether a policy of the city caused the constitutional violation.

PFEIFER, J., dissenting.

{¶ 22} As the majority relates, ceremonial burning is protected speech in this country. But every state has prohibitions against arson. To allow arson laws to be applied to small-scale, outdoor ceremonial burnings like the one in this case defeats the free-speech protections accorded those activities.

{¶ 23} Appellees were arrested for a violation of R.C. 2909.02, which provides:

{¶ 24} "(A) No person, by means of fire or explosion, shall knowingly do any of the following:

{¶ 25} "(1) Create a substantial risk of serious physical harm to any person other than the offender."

{¶ 26} If there was any risk here, it was not substantial. The burnings took place in a paved area cordoned off by metal barricades with firefighters with extinguishers nearby. Moreover, the record shows that burning pieces of the effigy landed near the protestors themselves, not anyone else. I agree with the appellate court that the facts of this case do not implicate the city's asserted interest in public safety. Thus, the city lacked "a sufficiently important governmental interest in regulating the nonspeech element" to justify the incidental limitation on appellees'

First Amendment freedoms. *United States v. O'Brien* (1968), 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672.

{¶ 27} If we allow flag burning in this country, we should certainly allow Chief Wahoo effigy burning. Our flag stands for over 200 years of freedom and unity; Chief Wahoo stands for 56 years (and counting) of baseball futility.

Terry H. Gilbert, for appellees.

Subodh Chandra, Cleveland Director of Law, Thomas J. Kaiser, Chief Trial Counsel, and Joseph G. Hajjar, Assistant Director of Law, for appellant.

Jim Petro, Attorney General, Douglas R. Cole, State Solicitor, and Elise Porter, Assistant Solicitor, urging reversal for amicus curiae, Ohio Attorney General.

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152 Ohio App.3d 687

2003-Ohio-2468

BELLECOURT et al., Appellants,

v.

CITY OF CLEVELAND et al., Appellees.

No. 80193.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.

Decided May 15, 2003.

Terry H. Gilbert, for appellants.

Thomas J. Kaiser, Chief Trial Counsel, and Joseph G. Hajjar, Assistant Law Director, for appellees.

Jillian S. Davis and ACLU of Ohio Foundation, Inc., Cleveland; Raymond Vasvari, Legal Director of ACLU of Ohio Foundation, Inc., for American Civil Liberties Union of Ohio.

PATRICIA ANN BLACKMON, Judge.

{¶ 1} Vernon Bellecourt and four other individuals appeal from a directed verdict granted by the common pleas court in connection with their Section 1983, Title 42, U.S.Code action against the city of Cleveland and several police officers. The police officers arrested them for aggravated arson after they burned an effigy of Chief Wahoo outside Jacobs Field at the opening game of the 1998 Cleveland Indians baseball season. On appeal, they assign the following errors for our review.

{¶ 2} "I. The trial court erred in granting the motion for summary judgment filed by David Regetz and

thereby preventing appellants from adding him as a defendant in their lawsuit."

{¶ 3} "II. The trial court erred in granting appellees' motion in limine which prevented appellants from introducing evidence of a pattern of conduct by the appellees."

{¶ 4} "III. The trial court erred in granting appellees' motion for a directed verdict in their favor at the close of all of the evidence when appellants had presented evidence sufficient to be submitted to the jury for its consideration and there were conflicts in testimony which should have been resolved by the jury."

{¶ 5} "IV. The demeanor of the trial court before and during trial and its conduct of the proceedings raise questions as to its impartiality and ability to provide a fair trial to appellants."

{¶ 6} Having reviewed the record and pertinent law, we affirm the judgment of the trial court regarding Rocco Pollutro, the city's police chief at the time of the incident, but reverse its judgment regarding the city of Cleveland, and accordingly remand the case for further proceedings consistent with this opinion. The apposite facts follow.

{¶ 7} On April 10, 1998, at the opening game of the Cleveland Indians baseball season, Vernon Bellecourt, Juan Reyna, James Watson, Charlene Teters, and Zizwe Tchiguka[1] participated in a demonstration outside Jacobs Field to protest the Cleveland baseball team's use of the

[1] On the arrest records, this individual was listed under his legal name, "Starling Perryman."

name "Cleveland Indians" and its use of "Chief Wahoo" as the team mascot.[2] These demonstrators marched to Jacobs Field carrying signs, then made speeches on a sidewalk outside Jacobs Field on Ontario Street, an area cordoned off with metal barricades and also surrounded by individuals from the city's community relations department, who acted as "peacekeepers" for the demonstration. Half a dozen firemen from the city's fire department were on duty at the scene.

{¶ 8} Following the march and speeches, the demonstrators attached an effigy of "Chief Wahoo"[3] and an effigy of "Black Sambo" to poles. Bellecourt then poured lighter fluid on the "Chief Wahoo" effigy and set it on fire, which the firemen promptly extinguished. Officers Daniel Nuti and David O'Reilly of the Cleveland Police Department, under the order of Commander David Regetz, arrested Bellecourt, Reyna, and Tchiguka. When Watson proceeded to set the effigy of "Black Sambo" on fire, the fireman also extinguished it and the officers arrested Watson and Teters. These demonstrators were handcuffed and taken to the Cleveland Police Department, where they were held for 24 hours before the police released them. Although

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[2] The Chief Wahoo mascot was created by Walter Golbach, a 17-year-old artist, for the owner of the Indians baseball team in 1948, and has undergone several transformations since then. In his analysis of the Chief Wahoo image, Dr. Robert Bane of John Carroll University described the feather on Chief Wahoo's head as a denigration of a sacred symbol, and its grinning buck teeth and hook nose as caricatures of real people. See Guggenheim, The Indians Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark (1998), 46 Cleve.St.L.Rev. 211.

[3] The effigy was dressed in a Cleveland Indians shirt and decorated with Wahoo on one side of the head and Michael White, then mayor of Cleveland, on the other side.

they were arrested for the offense of aggravated arson, the city never filed charges against them.

{¶ 9} On April 9, 1999, Bellecourt, Reyna, Watson, Teters, and Tchiguka filed a complaint in the common pleas court against the arresting officers Nuti and O'Reilly, then Police Chief Pollutro, and the city of Cleveland, raising several claims pursuant to Section 1983. The plaintiffs later amended their complaint, adding Commander Regetz as a defendant.

{¶ 10} Nuti and O'Reilly subsequently moved for summary judgment, which the court granted. The city and Pollutro also moved for summary judgment, but the court denied the motion. The court, moreover, granted Regetz's motion for summary judgment on the ground that the statute of limitations had already expired when the plaintiffs sought to add him as a defendant.

{¶ 11} At the trial that followed, the remaining defendants, the city of Cleveland and Pollutro, moved for a directed verdict at the close of all evidence, and the court granted that motion. This appeal followed.

{¶ 12} We address the plaintiffs' third assigned error first, in which they challenge the court's directed verdict in favor of the city.

{¶ 13} Under Civ.R. 50(A)(4), a motion for a directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, the reviewing court finds that reasonable minds could come to but one conclusion upon

the evidence submitted and that conclusion is adverse to the nonmoving party.[4]

{¶ 14} A motion for directed verdict raises the legal question of whether the plaintiff presented evidence legally sufficient to submit the case to the jury.[5] When ruling on a motion for a directed verdict, the court must not consider the weight of the evidence or the credibility of the witnesses.[6] "[I]f there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied."[7]

{¶ 15} Because the plaintiffs seek relief under Section 1983, our inquiry necessarily begins with a review of that statute, which states:

{¶ 16} "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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[4] *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 294, 699 N.E.2d 507.

[5] Id.

[6] *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679, 693 N.E.2d 271.

[7] Id.

{¶ 17} A Section 1983 violation must be predicated on a deprivation of constitutional rights.[8] Therefore, we first determine whether the city deprived the plaintiffs of a constitutional right. The plaintiffs argue that their effigy-burning is "speech" protected by the First Amendment and, therefore, the arrest of them based on that conduct deprived them of their rights guaranteed by the Constitution. The city, however, contends that the police lawfully arrested the plaintiffs, arguing that it had probable cause to arrest these demonstrators based on their conduct, which was the effigy-burning.

{¶ 18} Courts have long recognized that the First Amendment's protection does not end at the spoken or written word.[9] Obviously, not all conduct that is engaged in with an intention to express an idea warrants that protection.[10]

{¶ 19} In *Texas v. Johnson,* the United States Supreme Court considered whether burning of the American flag fell within the ambit of the First Amendment. The court held that the proper inquiry in this context is whether the activity was "'sufficiently imbued with elements of communication'"[11] to bring the First Amendment into play. The

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[8] *Bird v. Summit Cty.* (C.A.6, 1984), 730 F.2d 442, citing *Flagg Bros., Inc. v. Brooks* (1978), 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185.

[9] *Texas v. Johnson* (1989), 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342.

[10] Id., citing *United States v. O'Brien* (1968), 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672.

[11] *Johnson* at 404, quoting *Spence v. Washington* (1974), 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842; see, also, *State v. Lessin* (1993), 67 Ohio St.3d 487, 620 N.E.2d 72.

test for determination is "whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it."[12] The *Johnson* court instructed that the analysis of whether a conduct is expressive for First Amendment purposes must be made in the context in which the conduct occurs. The court explained that, under this standard, it had previously recognized as expressive conduct such activities as students wearing armbands to protest American military involvement in Vietnam, a sit-in by blacks in a "whites only" area to protest segregation, and picketing about a wide variety of causes. [13]

{¶ 20} Applying this analysis, the Supreme Court held in *Johnson* that flag burning is sufficiently imbued with elements of communication to implicate the First Amendment.

{¶ 21} The First Amendment analysis in *Johnson*, however, did not end there. Where "speech" and "nonspeech" elements are combined in the same conduct, the court, citing *United States v. O'Brien*,[14] reiterated the rule that a sufficiently important governmental interest in regulating a nonspeech element of conduct can justify incidental limitations on First Amendment freedom.[15] This rule comes into play, however, only when the governmental interest is unrelated to the suppression of free

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[12] *Johnson* at 404, 109 S.Ct. 2533, 105 L.Ed.2d 342; see, also, *Lessin*, supra.

[13] *Johnson* at 404., 109 S.Ct. 2533, 105 L.Ed.2d 342

[14] Supra, fn. 10.

[15] *Johnson*, 491 U.S. at 407, 109 S.Ct. 2533, 105 L.Ed.2d 342, citing *O'Brien* at 376, 88 S.Ct. 1673, 20 L.Ed.2d 672.

expression.[16] Thus, where "an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether the *O'Brien* test applies."[17]

{¶ 22} In the instant case, we have little difficulty identifying the communicative elements in plaintiffs' conduct of burning an effigy of Chief Wahoo. At trial, the plaintiffs offered testimony that the Cleveland Indians' mascot is seen by many in the Native American community as a discriminatory emblem which parodies and denigrates Native Americans and their culture. Our review of the record, which includes a videotape of the entire event, reflects that the demonstrators marched with signs and made speeches with bullhorns protesting the allegedly racist use of the Chief Wahoo mascot, before proceeding to burn the effigy of Chief Wahoo as a part of their demonstration. Under these circumstances, the demonstrators' intent to convey their perception of the racist use of the Wahoo logo is apparent. Equally obvious is the likelihood of that message being understood by those who viewed this conduct. We therefore conclude that the plaintiffs' burning of the effigies was conduct "sufficiently imbued with the elements of communication" to implicate the First Amendment.[18]

{¶ 23} The city claims to have properly arrested the plaintiffs to enforce its interest in preventing a safety hazard. However, the record shows that the demonstration

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[16] *Johnson* at 407, 109 S.Ct. 2533, 105 L.Ed.2d 342, citing *O'Brien* at 377, 88 S.Ct. 1673, 20 L.Ed.2d 672.

[17] *Johnson* at 407, 109 S.Ct. 2533, 105 L.Ed.2d 342.

[18] Accord *Lam v. Ngo* (2001), 91 Cal.App.4th 832, 111 Cal.Rptr.2d 582 ("effigies * * * are surely at least as protected a form of a political communication as flag burning").

took place in a paved area cordoned off with metal barricades and surrounded by police officers as well as six fire fighters equipped with fire extinguishers. Moreover, the public was rerouted away from the area.

{¶ 24} Under these circumstances, we do not find the state's asserted interest of preventing a safety hazard implicated on the facts before us. In accordance with *Johnson* and *Lessin,* therefore, we conclude that the officers' arrest of the plaintiffs interfered with their freedom of expression guaranteed by the First Amendment.

{¶ 25} Having determined that the city violated the plaintiffs' constitutional rights, we now address whether the plaintiffs are entitled to relief under Section 1983. The plaintiffs, relying on *Canton v. Harris,*[19] predicate the city's Section 1983 liability on its failure to adequately train its police personnel regarding proper responses to demonstrations involving ritual burnings.

{¶ 26} In *Harris,* the United States Supreme Court held that the inadequacy of police training may serve as a basis for Section 1983 liability, but only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.[20]

{¶ 27} Furthermore, the court in *Harris* explained that evidence of deliberate indifference need not be direct, stating:

{¶ 28} "[I]t may happen that in light of the duties assigned to specific officers or employees the need for more

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[19] *Canton v. Harris* (1989), 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412.

[20] Id. at 388, 109 S.Ct. 1197, 103 L.Ed.2d 412.

or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."[21]

{¶ 29} In applying this standard of liability, the Sixth Circuit Court of Appeals, in *Bills v. Aseltine*,[22] required plaintiffs to produce more than "merely colorable evidence" of a city's failure to train its officers and of its deliberate indifference to the rights of individuals.[23]

{¶ 30} Here, the record indicates the plaintiffs offered evidence to show that the city inadequately trained its police officers and that that inadequacy amounted to deliberate indifference to individuals' constitutional rights.

{¶ 31} In particular, Commander Regetz testified that he was aware of a prior demonstration at Jacobs Field in October 1997 during the World Series, where Bellecourt engaged in a similar effigy-burning activity and was arrested for it. He also testified that he did not receive any training on flag-burning or effigy-burning activities. Robert Schindler, Assistant Chief of the Cleveland Fire Department, who was on duty at the scene of the demonstration, testified that he had received no training on the constitutional issues regarding citizens' exercise of free speech involving the ritual burning of symbols such as flags or effigies. He also testified that he was unaware of any policy or protocol instituted to safeguard these rights or to protect the safety of the spectators in such events.

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[21] Id. at 390, 109 S.Ct. 1197, 103 L.Ed.2d 412.

[22] *Bills v. Aseltine* (C.A.6, 1992), 958 F.2d 697, 708.

[23] Id. at 708.

{¶ 32} As we have determined, the First Amendment as interpreted by the courts sanctions the ritual burning of flags and other similarly symbolic objects. The city of Cleveland, which had a prior experience with effigy-burning in a similar setting, failed, however, to institute any policy safeguarding this exercise of free expression or otherwise train its safety forces for proper responses to a demonstration involving ritual burning. Instead, the city arrested individuals engaging in this protected activity for aggregated arson.[24]

{¶ 33} Our review of the record therefore indicates that the plaintiffs have at a minimum presented evidence upon which reasonable minds might reach different conclusions as to the city's Section 1983 liability based on its alleged failure to adequately train its safety forces, which amounted to deliberate indifference to individuals' rights under the law. In accordance with Civ.R. 50(A)(4), therefore, we conclude that the court erred in directing a verdict in favor of the city.

{¶ 34} Regarding Pollutro, our review of the brief submitted by the appellants indicates they do not challenge the court's directed verdict granted in favor of Pollutro, having presented no claim on appeal regarding

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[24] {¶ a} R.C. 2909.02 defines aggravated arson as the following:

{¶ b} "(A) No person, by means of fire or explosion, shall knowingly do any of the following:

{¶ c} "(1) Create a substantial risk of serious physical harm to any person other than the offender;

{¶ d} "(2) Cause physical harm to any occupied structure;

{¶ e} "(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure."

this defendant for our review. Accordingly, we affirm the court's judgment in favor of Pollutro.

{¶ 35} In their first and second assignments of error, the plaintiffs challenge, respectively, the court's granting of Regetz's motion for summary judgment and its ruling on the city's motion in limine to exclude testimony regarding the plaintiffs' participation in a prior effigy-burning demonstration.

{¶ 36} The city asserts that because the appellants failed to designate these orders in their notice of appeal, this court is without jurisdiction to review either of these claims.

{¶ 37} Our review of the record indicates that we lack jurisdiction to review the assigned error regarding summary judgment granted in favor of Regetz; the plaintiffs' claim of error regarding the court's ruling on the city's motion in limine, however, as we explain below, is properly before us for review.

{¶ 38} The record shows that the notice of appeal filed in this case designated only the trial court's August 7, 2001 order granting the defendants' motion for a directed verdict. The appellants did not designate or otherwise refer to the order granting summary judgment in favor of Regetz that they now assign as error. This court has interpreted App.R. 3(D) to require an appellant to designate judgments or orders in the notice of appeal.[25] App.R. 3(D) provides:

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[25] *Slone v. Bd. of Embalmers & Funeral Directors* (1997), 123 Ohio App.3d 545, 704 N.E.2d 633, citing *Parks v. Baltimore & Ohio RR.* (1991), 77 Ohio App.3d 426, 428, 602 N.E.2d 674; *Schloss v. McGinness*

(Continued on following page)

{¶ 39} "(D) Content of the notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. * * * "

{¶ 40} In accordance with this rule, we have consistently declined jurisdiction to review a judgment or order that is not designated in the notice of appeal. Therefore, the plaintiffs' first assigned error relating to the summary judgment granted in favor of Regetz is not properly presented to us for an appellate review.

{¶ 41} Regarding the second assignment of error, which challenges the court's granting of the city's motion in limine to exclude evidence proffered by the plaintiffs, the record reflects that the court heard arguments prior to trial on this motion but did not rule on it. During trial, after hearing additional arguments from the parties, the court orally granted the motion without journalizing any order regarding this motion. Because the court made the ruling as part of the trial, this ruling is subsumed by the court's final judgment in this case for the purposes of App.R. 3(D). Accordingly, our review of this alleged error is permitted by App.R. 3(D).

{¶ 42} The evidence the city sought to exclude in its motion in limine related to the participation in a similar

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(1984), 16 Ohio App.3d 96, 98, 16 OBR 101, 474 N.E.2d 666; *Cavanaugh v. Sealey* (Jan. 23, 1997), Cuyahoga App. Nos. 69907, 69908 and 69909, 1997 WL 25521; *In re Estate of Borgh* (Jan. 4, 1996), Cuyahoga App. Nos. 68033 and 68145, 1996 WL 4039; *Chotkevys v. Seman* (Sept. 21, 1995), Cuyahoga App. No. 67812, 1995 WL 558871; *McCarthy v. Stop-N-Shop Supermarkets, Inc.* (July 28, 1994), Cuyahoga App. No. 65839, 1994 WL 393696.

demonstration by two of the plaintiffs at a World Series game on October 23, 1997, outside Jacobs Fields. In that demonstration, these two individuals also burned an effigy and were arrested and charged with misdemeanor offenses including criminal endangering, resisting arrest, aggravated disorderly conduct, and criminal trespass. The trial court in that case subsequently acquitted them of those charges pursuant to Crim.R. 29.

{¶ 43} The record reflects that the court granted the motion in limine because it reasoned that the October 23, 1997 arrests were made under different circumstances. It also noted that the plaintiffs in that case were arrested by police officers who, although wearing the police uniforms, were working off-duty for a private security company on the day of the incident. The court in addition stated that the plaintiffs on that occasion were arrested for different offenses.

{¶ 44} As we have explained in our analysis of the plaintiffs' third assigned error, in order to establish the city's Section 1983 liability based on inadequate training of its police officers, the plaintiffs need to show that the inadequacy amounted to deliberate indifference. Therefore, the city's prosecution of the plaintiffs for a prior identical effigy-burning activity and their subsequent acquittals is probative evidence offered to show that the city, despite its knowledge of the plaintiffs' ritual burning activities, were deliberately indifferent to their rights in failing to adequately train its safety forces for proper

responses. Accordingly, we conclude that the court improperly excluded this evidence.[26]

{¶ 45} Finally, in connection with the plaintiffs' fourth assignment of error claiming the court's lack of impartiality deprived them of a fair trial, our disposition of this appeal renders moot an analysis of that claim.[27]

{¶ 46} In that assignment of error, the appellants also request, without citing any authority, that we give an instruction upon remand for a transfer of this case to the docket of a different judge. They essentially ask us to disqualify the trial judge.

{¶ 47} In *Howard Gralnick, Inc. v. Turner*,[28] we were confronted with a similar claim and concluded that we lacked subject matter jurisdiction to review a claim of this distinction, after observing:

{¶ 48} "Section 5(C) of Article IV of the Ohio Constitution, reserves to the Chief Justice of the Supreme Court the sole authority to pass upon the disqualification of any judge of the court of common pleas. The Supreme Court has held that a court of appeals is without authority to pass upon disqualification * * * ."[29]

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[26] In its motion in limine, the city also sought to exclude testimony by an assistant city prosecutor regarding his decision not to file charges against those arrested in the instant effigy-burning incident. Our reading of the transcript shows, however, that the court never ruled on the admissibility of this testimony and therefore this issue is not proper for an appellate review at this time.

[27] See App.R. 12(A)(1)(c).

[28] (Mar. 25, 1993), Cuyahoga App. No. 62316, 1993 WL 87689.

[29] Id., citing *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 8 O.O.3d 438, 377 N.E.2d 775.

{¶ 49} Similarly here, we have no subject matter jurisdiction to address the plaintiffs' request to disqualify the trial judge. This assignment is overruled.

{¶ 50} Accordingly, the judgment is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part and cause remanded.

DIANE KARPINSKI, J., concurs.

KENNETH A. ROCCO, A.J., concurs and dissents.

KENNETH A. ROCCO, Administrative Judge, concurring and dissenting.

{¶ 51} I must respectfully dissent from the majority's disposition of the second and third assignments of error. In my view, the trial court properly directed the verdict because appellants did not prove that the city of Cleveland's failure to train its police officers was the result of deliberate indifference to appellants' first amendment rights. Therefore, I would affirm the judgment below.

{¶ 52} There is little doubt that the burning of the effigy of the Cleveland Indians' mascot, "Chief Wahoo,"[30] was expressive conduct protected by the First Amendment, and that appellants' arrest without probable cause to believe a crime was being committed deprived them of their First Amendment rights. In order to hold the city

[30] The caricature of Chief Wahoo is at best insensitive, at worst, vile. I am optimistic that a new mascot will be made part of the Indians' effort to rebuild its team, allowing for the retirement of this inappropriate symbol of a bygone era.

liable for this deprivation, however, appellants had to prove not only a violation of their constitutional rights, but also that the violation was the result of a custom or policy of the city. *Monell v. Dept. of Social Serv. of New York City* (1978), 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611. Appellants claim that the city's failure to train its police officers in how to handle "ritual burnings" demonstrated the city's deliberate indifference to the First Amendment rights of its citizens, thus proving that the constitutional deprivation was the result of a city policy. *Canton v. Harris* (1989), 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412. In this case, however, failure to train did not show deliberate indifference.

{¶ 53} "Deliberate indifference" is a stringent standard which requires proof that the municipality disregarded a *known or obvious risk*. *Bryan Cty. Bd. of Commrs. v. Brown* (1997), 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626. The Supreme Court has held that there are two ways to demonstrate deliberate indifference through proof of inadequate police training. First, repeated constitutional violations in the past may demonstrate such a need for training that the municipality's failure to provide it shows a conscious disregard for the rights of its citizens. *Canton,* 489 U.S. at 390, 109 S.Ct. 1197, 103 L.Ed.2d 412. Alternatively, if there is an obvious potential for constitutional violations in recurring situations, the city's failure to provide training to avoid that potential can be said to be deliberately indifferent to the need. Id.

{¶ 54} The evidence in this case showed that effigy-burning incidents occurred in the past and that police officers had received no training in how to handle such incidents. These facts alone do not demonstrate that the

city was deliberately indifferent to the constitutional rights of its citizens. To satisfy this branch of the *Canton* analysis, there must be evidence that constitutional violations occurred during the prior incidents so that the city knew that training was required. There was no such evidence here.[31]

{¶ 55} Nor was the alternative branch of the *Canton* analysis met. The effigy-burning situation does not present such an obvious potential for violation of constitutional rights that the city's failure to recognize a need for training amounted to deliberate indifference. A high degree of predictability is essential to this branch of the *Canton* analysis: "The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected 'deliberate indifference' to the obvious consequence of the policymaker's choice – namely, a violation of a specific constitutional or statutory right." *Brown*, 520 U.S. at 409, 117 S.Ct. 1382, 137 L.Ed.2d 626. I simply do not see any obvious likelihood that police will violate citizens' First Amendment rights if they are not specially trained in the handling of effigy burnings.

{¶ 56} In my view, appellants did not present any evidence that the city's failure to train its police officers demonstrated a deliberate indifference to the constitutional rights of its citizens. Accordingly, I would affirm the trial court's judgment for the city on appellants' claims.

---

[31] The fact that the charges resulting from the prior incident were dismissed on a Rule 29 motion does not even suggest that a constitutional violation occurred.

{¶ 57} I would further hold that the trial court order granting the city's motion in limine and excluding evidence of appellants' prior prosecution is a moot issue. In its cross-examination of appellant Bellecourt, the city opened the door to testimony about the prior prosecution of appellants. As a result, the prior prosecution was thoroughly explored on redirect and recross-examination. Therefore, the purported exclusion of this testimony does not justify retrial.

{¶ 58} I agree with the majority that we should not consider appellants' challenge to the order granting summary judgment to defendant Regetz, but I do not agree that we lack jurisdiction to address this question. The only jurisdictional aspect of the notice of appeal is the timing; the content can be amended within the discretion of the court of appeals and upon such terms as the court deems just. App.R. 3(A) and (E). Nonetheless, appellants did not designate this order in their notice of appeal or in any motion to amend the notice, and thus failed to apprise the defendants that they were appealing from the summary judgment. See App.R. 3(D); *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, 324, 649 N.E.2d 1229; *Maritime Mfrs., Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 436 N.E.2d 1034. This argument involves a different defendant, a different substantive issue, and a different procedural point in the case than the order actually designated in the notice of appeal. Therefore, it would be unfair to allow appellants to argue the issue now.

{¶ 59} Finally, I agree that we lack jurisdiction to disqualify a trial judge and therefore cannot address the issue raised in appellants' fourth assignment of error.

{¶ 60} Accordingly, I concur and dissent.

Ohio Revised Code § 2909.02 Aggravated Arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Create a substantial risk of serious physical harm to any person other than the offender;

(2) Cause physical harm to any occupied structure;

(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

(B)(1) Whoever violates this section is guilty of aggravated arson.

(2) A violation of division (A)(1) or (3) of this section is a felony of the first degree.

(3) A violation of division (A)(2) of this section is a felony of the second degree.

(2)

No. 04-1248

Supreme Court, U.S.
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In The Supreme Court of the United States

VERNON BELLECOURT, *et al.*,

Petitioners,

v.

CITY OF CLEVELAND,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should decline to review, on the grounds that it does not raise an important federal question, an Ohio Supreme Court decision that applied: (A) *Texas v. Johnson*, 491 U.S. 397 (1989), in recognizing that "[w]ithout question, the effigy burnings [are] constitutionally protected speech"; and (B) *United States v. O'Brien*, 391 U.S. 367 (1968), in holding that, under the specific factual record before it, the City of Cleveland had a sufficiently important governmental interest in public safety that was implicated when, on a "blustery day" outside a baseball stadium, Petitioners "doused a newspaper-stuffed effigy" with a can of highly flammable charcoal-lighter fluid, then "sprayed additional lighter fluid on the effigy" after it had already ignited, which caused the fire to "quickly accelerate[]" and to scatter burning remnants into a crowded area, where one large piece of burning debris landed on a person's foot.

Whether this Court should decline to review, on the grounds that it does not raise an important federal question, an Ohio Supreme Court decision that implicitly held, as a matter of state-law interpretation and based on the specific factual record before it, that an Ohio arson statute – making it illegal for any "person, by means of fire, . . . [to] [c]reate a substantial risk of serious physical harm to any person other than the offender" – could apply to a person: (A) who uses fire to endanger principally, but not exclusively, persons sympathetic to his protest; and (B) who does so in a crowd of protesters who are themselves partially, but not completely, segregated by barriers from other members of the public.

LIST OF PARTIES TO THE PROCEEDINGS

The Petitioners in this case are: Vernon Bellecourt, Juan Reyna, James Watson, Charlene Teters, and Zizwe Tchiguka.

The Respondent is the City of Cleveland.

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INTRODUCTION

This case arises out of Respondent City of Cleveland's efforts to preserve public safety by arresting Petitioners Vernon Bellecourt, Juan Reyna, Zizwe Tchiguka, James Watson, and Charlene Teters who, when exercising their First Amendment right of expression, endangered a crowd of people by *unsafely* burning a nearly life-sized effigy.

Contrary to Petitioners' misleading formulation of the issue, this case is not about whether this Court's rulings prohibit the City of Cleveland from arresting "any speaker who burns an object in effigy, no matter how small or brief the fire, no matter how minor the threat to public safety." (Pet. i.) Indeed, the principal reason why this case raises no important federal question is because Petitioners are seeking review of a *factually specific* finding by the Ohio Supreme Court that nothing in *Texas v. Johnson* or *United States v. O'Brien* prevents police officers from arresting these particular Petitioners for their conduct in burning a nearly life-sized effigy on a blustery day, in a crowded area, by spraying additional accelerant on open flames and causing burning debris to scatter in the winds and fall on and near people. Because the Ohio Supreme Court recognized that "[w]ithout question, the effigy burnings were constitutionally protected speech" (Pet. App. 3) and generally agreed that "the right to free speech is hollow if it is exercised at the expense of arrest" (Pet. App. 3), and because Cleveland's police officers did not arrest other protesters who engaged in smaller scale and safer symbolic burnings that day (Tr. 389-90), Petitioners can fabricate a federal question involving effigy burning in general only by sanitizing, misrepresenting, and omitting almost all of the key material facts that persuaded the Ohio Supreme Court to find that Petitioners' particular conduct

in this specific case implicated an important governmental interest in public safety.

Moreover, Petitioners' second Question Presented also fails to raise an important federal question because it asks this Court to review the Ohio Supreme Court's implicit interpretation of a state law: Ohio's aggravated arson statute. That statute authorizes police officers to arrest any person who "by fire . . . [c]reates a substantial risk of serious physical harm to any person other than the offender." Ohio Rev. Code § 2909.02 (Pet. App. 31).

Petitioners have two problems with their argument that this Court should hear this case because they were "arrested under an aggravated arson statute that was not remotely applicable to the situation." (Pet. 9.) First, even if the Ohio Supreme Court's construction of the arson statute was erroneous – which it is not – this Court does not grant the Writ of Certiorari to review a state court of last resort's interpretation of whether a state law applied to a particular situation. And second, Petitioners' second Question Presented is predicated upon the same distortion of the factual record which, contrary to this Court's own guidelines, they are asking this Court to grant certiorari to review.

STATEMENT OF THE CASE

On April 9, 1998, the night before the opening game of the Cleveland Indians' baseball season, Petitioners prepared two nearly life-sized effigies to burn the next day at

Jacobs Field.[1] The effigies, one of the Cleveland Indians' team logo "Chief Wahoo" and the other of "Little Black Sambo," were stuffed with newspapers, covered by cloth, and were to be hung from wooden poles. To protest the Cleveland baseball team's use of the name "Cleveland Indians" and its team logo, Petitioners planned to burn the effigies following a march and demonstration that they had also organized. To effectuate their purpose, they made sure they had a can of charcoal-lighter fluid and some cigarette lighters, but did not think to bring a fire extinguisher or any receptacle to contain the flames or any burning debris. (Tr. 190-91, 227.)

On April 10, 1998, Petitioners and other protesters marched to Jacobs Field and gave speeches outside the stadium. Although Petitioners emphasize that this area was cordoned off with metal barricades to segregate the protesters from the baseball fans (Pet. 3, 8), a videotape of the event shows that the barricades were used solely to prevent pedestrians – fans as well as protesters – from entering into the path of motor vehicles. The barricades did not, in fact, succeed in isolating the protesters because in the vicinity where they planned to burn the effigies were civilian peacekeepers, other protesters not planning to participate in the burnings, members of the media, and some baseball fans, including children.

Following the marches and speeches, Petitioner Bellecourt soaked the first effigy with charcoal-lighter fluid. Commander David Regetz, the ranking police officer

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[1] Jacobs Field has been the home of the Cleveland Indians baseball team since 1994.

at the scene, and Assistant Fire Chief Robert Schindler, who had thirty years of fire-fighting experience, warned the Petitioners that it was dangerous to light the effigies under the conditions present at the time. (Tr. 246, 289-90.) Ignoring these warnings, Petitioner Reyna held up the first effigy that Bellecourt had soaked with lighter fluid, while another protester (not a Petitioner) shielded the wind so that the effigy could catch fire. According to "The Local Climatological Data for Cleveland,"[2] the wind speed at around that time, i.e., just before game time, was 16 mph.

As soon as the first effigy caught on fire, Bellecourt sprayed more charcoal-lighter fluid on the already burning effigy to increase the intensity of the fire. (Tr. 225-26.) The fire then quickly accelerated and, within seconds, completely engulfed the effigy, causing it to disintegrate. Burning remnants of the effigy were swept up by the wind. At that point, Commander Regetz decided that the danger to public safety justified an arrest:

> It was the cumulative effect of the wind, the fact that people were walking in front along Ontario Street, some people actually cut through the demonstrations, and then when I saw the thing, the effigy burning and saw the distinct possibility that lit paper could be blowing around and could end up landing on somebody, that's what made my decision.

(Tr. 294.)

---

[2] The Local Climatological Data for Cleveland was introduced at trial as Defendants' Exhibit 5.

Like Commander Regetz, Assistant Fire Chief Schindler would also later testify that on that day, "it was windy enough [for the floating burning debris] to be a concern. . . ." (Tr. 249.) As the effigy was burning, "[he] was worried about one of the people passing by or possibly one of the protesters themselves getting hurt from this burning." (Tr. 259.) Schindler also explained why he thought this particular effigy burning was dangerous:

> It was not in something. It wasn't in a barrel or in a barbecue where it could be contained and pieces wouldn't be getting out and blowing around in the wind. There was some accelerant on it. . . . I was concerned about someone getting hurt from that. You don't know what people's clothes are made of. A piece of cloth or the paper in the effigy could blow against someone's clothes and if it's fuzzy enough it could catch on fire, or a little, small piece could catch them on the face and give them a burn welt.

(Tr. 259-60.)

Both Regetz and Schindler's concerns proved to be justified. After the effigy had disintegrated, the wind caused one of the burning remnants to land on Petitioner Reyna's left foot. Reyna did not notice the burning debris on his foot until after the Cleveland firefighters extinguished the flame. There were approximately six firefighters monitoring the protests, and between them they were able to retrieve two fire extinguishers that had been located in "little huts, little storage buildings" in the area. At the civil trial,[3] Reyna continued to deny the danger of

[3] Petitioners were never criminally prosecuted after they were arrested.

having come into direct contact with a sizeable, still-burning remnant, but Petitioner Watson, a Ph.D. with extensive experience in laboratory work, was more forthcoming. Dr. Watson admitted under oath that Bellecourt's actions were unsafe. In doing so, Watson further conceded that the can of charcoal-lighter fluid could have exploded, creating a "substantial risk of serious physical injury." (Tr. 225-26.)

After the first effigy was lit and then extinguished, the police officers at the scene arrested Bellecourt, Tchiguka, and Reyna. Shortly after, Petitioners Watson and Teters – who had witnessed the other three Petitioners get arrested (Tr. 231-32, 329) – nevertheless lit the second accelerant-soaked effigy and were also arrested. Tellingly, the police did not arrest other protesters at that same place and time who engaged in less dangerous symbolic burnings. Commander Regetz testified that after he arrested Petitioners, he saw other protesters holding "three-by-five cards" of Chief Wahoo and lighting the cards on fire, without using accelerants. Regetz chose not to arrest those protesters because "[he] didn't see a danger there." (Tr. 389-90.)

After their arrests, Petitioners were booked and jailed for aggravated arson and then released the next day. The City chose not to pursue the criminal charges.

On April 6, 2001, Petitioners' case against the City of Cleveland and the Cleveland Chief of Police Rocco Pollutro in his official capacity went to trial on Petitioners' Section 1983 claim for alleged violations of their First, Fourth and Fourteenth Amendment rights. Petitioners were unable to proceed against Commander Regetz because the statute of limitations had expired.

At the close of their case, the City and Chief Pollutro moved for a directed verdict. The municipal defendants argued that on the specific factual record of this case, no reasonable jury could find that Commander Regetz lacked probable cause to arrest Petitioners because of the threat they posed to public safety. The municipal defendants also argued that Petitioners had failed to meet their burden under Section 1983 to show the existence of a policy or custom that was the moving force behind the alleged constitutional violations. The trial court granted defendants' motion and directed a verdict in their favor.

On appeal, the Cuyahoga County Court of Appeals, reversed the trial court in a two-to-one decision handed down on May 15, 2003. (Pet. App. 12.) The court of appeals found that the City's asserted interest in protecting public safety was not implicated on the factual record before it (Pet. App. 20); therefore, the court need not consider whether, under *United States v. O'Brien*, "a sufficiently important governmental interest in regulating a non-speech element of conduct [justified] incidental limitations on First Amendment freedom." (Pet. App. 18.) The court also ruled that the trial court erred in directing a verdict in favor of the City on plaintiffs' Section 1983 claims. (Pet. App. 22.)

On July 10, 2003, the City filed its notice of appeal to the Supreme Court of Ohio. On December 15, 2004, in a five-to-two opinion, the Supreme Court of Ohio reversed the decision of the court of appeals. The Ohio Supreme Court recognized that, "[w]ithout question," under *Texas v. Johnson*, "the effigy burnings were constitutionally protected speech." (Pet. App. 3.) Moreover, the court "generally agree[d]" with the Petitioners' argument that "the right to free speech is hollow if it is exercised at the

expense of arrest." (Pet. App. 3.) The court ruled, however, that the "suppression of speech [in this particular case] was incidental to Cleveland's important interest in preventing harm caused by fire." (Pet. App. 3-4.) The court distinguished *Johnson* from the present case by stating that "[u]nlike *Johnson*, however, the *facts* here indicate that Cleveland's asserted interest in preserving public safety was implicated." (Pet. App. 5 (emphasis added).)

The majority opinion therefore implicitly rejected the reasoning of the two dissenting opinions, both of which had focused on the proper construction of Ohio Rev. Code § 2909.02, Ohio's aggravated arson statute. That statute provides in relevant part:

> (A) No person, by means of fire or explosion, shall knowingly do any of the following:
>
> (1) Create a substantial risk of serious physical harm to any person *other than the offender*.

Ohio Rev. Code § 2909.02 (Pet. App. 31) (emphasis added). The gravamen of both dissenting opinions is that, on this record, "[e]ven though one might be concerned with the potential danger of burning effigies, there is no evidence that anyone *other than the protesters* [*themselves*] were placed in any risk of serious physical harm resulting from appellees' conduct." (Pet. App. 9 (Moyer, C.J., dissenting) (emphasis added); *see also* Pet. App. 10 (Pfeiffer, J., dissenting) ("the record shows that burning pieces of the effigy landed near the protesters themselves, *not anyone else.*") (emphasis added).)

On this matter of state-law interpretation, however, the Ohio Supreme Court's majority opinion refused to take such a crabbed view of who qualifies to be protected from substantial risk of physical harm:

> Though appellees emphasize that they set the fire in a cordoned area devoid of flammable property, the police were obligated to protect *the public, including the protestors themselves.* A video of the effigy burnings and arrests is part of our record. It shows a protestor spraying accelerant on a burning effigy and then retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began floating in the wind and landing in the proximity of the protestors. These facts implicate Cleveland's asserted interest in public safety.

(Pet. App. 5 (emphasis added).)

After determining that a governmental interest was implicated on the *facts* before it, the Ohio Supreme Court applied the first three of the four-pronged intermediate scrutiny test that this Court defined in *United States v. O'Brien*, 391 U.S. 367 (1968):

> The parties do not dispute, nor do we question, that safety regulations are within Cleveland's constitutional powers or that such regulation furthers an important or substantial government interest that is generally unrelated to the suppression of free expression. Therefore, the first three prongs of *O'Brien's* test are satisfied.

(Pet. App. 5-6.) Turning to the fourth prong, the Ohio Supreme Court held:

> *Under the facts before us*, we determine that the arrests were narrowly tailored to Cleveland's asserted interest in preserving public safety. Therefore, the fourth prong of *O'Brien's* test is satisfied, and any incidental limitation on appellees' First Amendment freedoms was justified.

(Pet. App. 7 (emphasis added).)

Since the Ohio Supreme Court's opinion faithfully applied this Court's rulings in *Johnson* and *O'Brien*, and turned on the court's specific findings of fact as well as its interpretation of Ohio's aggravated arson statute, this case raises no substantial federal question, and this Court should therefore deny Petitioners' request for review.

ARGUMENTS

I. This Court Should Deny The Writ Because The Decision Of The Ohio Supreme Court Turned On Factual Issues That Do Not Raise A Federal Question And That Petitioners Have Not Accurately Represented In Their Request For Review.

Although Petitioners do their best to couch their argument in terms of an important federal question, their efforts are unavailing. What Petitioners' complaint boils down to is that they disagree with the Ohio Supreme Court's findings of fact, findings that were based on evidence so overwhelmingly in the Respondent's favor that the trial court in this case entered a directed verdict for the City of Cleveland. Recognizing that Petitioners had a First Amendment right to use effigy burning as a means to express their views, the Ohio Supreme Court nevertheless held that the dangerous manner in which they did so on April 10, 1998, implicated a sufficiently important governmental interest in public safety to justify incidental restrictions on speech. Only by omitting, distorting, and misrepresenting what happened that day can Petitioners try to persuade this Court that anything the Ohio Supreme Court said or did creates a federal question. And unfortunately for Petitioners, even if the Ohio Supreme

Court somehow got the facts wrong – which it did not do – this Court's Rule 10 would still block their path to the Courthouse door: "[C]ertiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10; *see also* Robert L. Stern, *Supreme Court Practice* 459 (8th ed. 2002) ("[t]he Court is too busy to supervise every application of its precedents to particular facts and circumstances, even if a given application is arguably wrong.")

A. The Ohio Supreme Court Properly Stated And Properly Applied To The Facts Before It This Court's Rulings In *Texas v. Johnson* And *United States v. O'Brien.*

Although Petitioners, sounding a lot like Chicken Little, allege that the Ohio Supreme Court's opinion "created a fire safety exception to *Texas v. Johnson* so easy to invoke that it effectively overrules that decision" (Pet. 8), while also "us[ing] *O'Brien* to set up an invincible fire safety justification so easy for the State to invoke that it can be used to punish virtually every instance of flag burning and effigy burning" (Pet. 8), the truth is that the sky is *not* falling, because the Ohio Supreme Court correctly applied both *Johnson* and *O'Brien* to the factual record before it.

The opinion began by affirming that "[w]ithout question, the effigy burnings were constitutionally protected speech. See *Texas v. Johnson*." (Pet. App. 3 (full citation omitted).) The court also stated that it "generally agree[d]" with Petitioners' argument "that the right to free speech is hollow if it is exercised at the expense of arrest." (Pet. App. 3.) Having affirmed and applied – rather than overruled,

as Petitioners contend – this Court's decision in *Johnson*, the opinion next turned to *United States v. O'Brien*: "When speech and nonspeech elements are part of the same course of conduct, 'a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.' *United States v. O'Brien.*" (Pet. App. 4 (full citation omitted).) After quoting the four criteria that the *O'Brien* Court established for determining whether a state regulation is justified, the Ohio Supreme Court then stated the precise question raised by the case before it:

> The threshold issue to *O'Brien's* test is whether a governmental interest asserted by Cleveland is implicated on the facts before us. See *Texas v. Johnson*. If the city has not asserted a pertinent interest, then we cannot apply *O'Brien's* test, and the city has failed to justify its infringement upon appellees' right to free speech.

(Pet. App. 4 (full citations omitted).)

The Ohio Supreme Court then distinguished *Johnson* even as it acknowledged its factual similarities to this case: "As in *Johnson*, the conduct in question here involved expression via the burning of a symbol." (Pet. App. 5). But "[u]nlike *Johnson*, however, the facts here indicate that Cleveland's asserted interest in preserving public safety [as opposed to Texas' asserted interest in avoiding a possible breach of public order] was implicated." (Pet. App. 5.) The Ohio Supreme Court based that finding in part on the testimony of the police officers on the scene: "In the judgment of Cleveland's police officers, the windy conditions coupled with the spraying of additional accelerant on the already burning effigies created a hazard, which was their responsibility to remedy." (Pet. App. 5.) But the

justices did not rely exclusively on their testimony, which directly contradicts Petitioners' assertion that the court "[u]ltimately . . . fully justified [these arrests] under *O'Brien* 'because of a perceived public safety threat' *by the police*." (Pet. 7 (*quoting* Pet. App. 7) (emphasis added); *see also* Pet. at 8-9 ("Under the Opinion police are free to arrest and jail anyone who burns a flag or an effigy, so long as they 'perceive' the requisite 'threat' to public safety") (*quoting* Pet. App. 7).) On the contrary, the Ohio Supreme Court *independently* reviewed the specific factual record before it and reached its own conclusions about the extent of the danger to public safety:

> A video of the effigy burnings and arrests is part of our record. It shows a protestor spraying accelerant on a burning effigy and then retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began floating in the wind and landing in the proximity of the protestors. *These facts* implicate Cleveland's asserted interest in public safety.

(Pet. App. 5 (emphasis added).) Thus, the justices used their own eyes – and not merely the perceptions of the police – in finding on these facts that the effigy burnings that day were sufficiently dangerous to implicate the City's interest in preserving public safety.

Because the Ohio Supreme Court so clearly premised its holding on the fire threat to public safety, this Court should not be taken in by Petitioners' misrepresentation that what is at stake here is "the state's interest in maintaining order." (Pet. 10 ("[F]ree speech rights are not so easily trumped (*as they were here*) by the 'state's interest in maintaining order.'") (emphasis added).) The Ohio Supreme Court's only reference to "maintaining order" was

when it paraphrased the holding in *Johnson*: "In sum, Johnson was arrested for exercising a constitutional right, not for conduct that threatened the state's interest in maintaining order." (Pet. App. 5.) In other words, the threat to public order was what was at stake in *Johnson* and every time the Ohio Supreme Court referred to the intent at stake here, it always spoke in terms of preserving "public safety" and never once "public order."

Once it determined that a governmental interest in preserving public safety was implicated, the Ohio Supreme Court applied the four-prong *O'Brien* test to determine if the City's infringement on Petitioners' right to free speech was justified: "The parties do not dispute, nor do we question, that safety regulations are within Cleveland's constitutional powers or that such regulation furthers an important or substantial government interest that is generally unrelated to the suppression of free expression. Therefore, the first three prongs of *O'Brien's* test are satisfied." (Pet. App. 5-6.) In turning to the fourth prong – whether the incidental restriction on free expression is no greater than necessary to further the City's interest in preserving public safety – the court properly refused to apply strict scrutiny: "[O]ur analysis is based on *O'Brien's* relatively lenient standard that 'is little, if any, different from the standard applied to time, place, or manner restrictions.'" (Pet. App. 6 (*quoting Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)).) The court also recognized that the City's actions had to be "narrowly tailored to serve the government's legitimate, content-neutral interests" (Pet. App. 7 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781 (1989))), but need not be "the least restrictive . . . means"

of doing so, as the following quotation from *Ward* makes abundantly clear:

> [W]e reaffirm today that a regulation of the time, place, or manner of protected speech . . . need not be the least restrictive or least intrusive means of doing so. . . . [T]he regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward, 491 U.S. at 798-800, *quoted in* Pet. App. at 7. The court then rejected the Petitioners' arguments – repeated here – that the court should impose a duty to warn and to require a less restrictive alternative than arrest, a rejection that was carefully grounded in the factual record:

> [A]ppellees' argument presumes that warnings would have obviated a fire hazard or that they were arrested merely for burning effigies. To be certain, the police knew that protestors intended to burn effigies. There is no indication, however, that the police had prior knowledge of the dangerous manner in which the effigies were to be burned, and it would be utterly impractical to require police to be so prescient as to issue appropriate warnings. Moreover, the record demonstrates that Cleveland arrested appellees not because they burned effigies, but because of a perceived public safety threat in the manner in which they burned the effigies.

(Pet. App. 7.) "*Under the facts* before us" the Ohio Supreme Court concluded "that the arrests were narrowly tailored to Cleveland's asserted interest in preserving public safety." (Pet. App.7 (emphasis added).)

B. The Petitioners Have Not Accurately Represented The Factual Record Upon Which The Ohio Supreme Court Relied And Which They Distort In A Vain Attempt To Raise A Federal Question.

Petitioners know full well that this Court would never grant certiorari if they claimed merely that the decision of the Ohio Supreme Court was based on erroneous factual findings. Therefore, they strain to present this Court with a much tamer version of the manner with which they conducted their burnings and then ask this Court, based on *that* version of the facts, to conclude that "[i]f a substantial threat to fire safety may be found *on this record*, then it will be present every time a flag or effigy is burned." (Pet. 8 (italics in the original).)

Perhaps the most glaring omission of Petitioners' brief is their failure to disclose that the "meager little fires" (Pet. 8) that they refer to in their petition actually involved the spraying of accelerant on already-burning, nearly life-sized effigies that had already been soaked in lighter fluid. Additionally, Petitioners fail to mention the 16 mph winds that were gusting at the time of the burnings, even though this fact so impressed the Ohio Supreme Court that the first line of its opinion reads as follows: "April 10, 1998, opening day for the Cleveland Indians baseball team, was a blustery day in downtown Cleveland." (Pet. App. 1.) Moreover, while Petitioners claim that the "danger 'highlight' " of the burnings was a "fragment of burning material float[ing] to the ground near one of the protesters" (Pet. 8), the Ohio Supreme Court, which watched the video of the burnings, describes a scene where a protester was "retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began

floating in the wind . . . " (Pet. App. 5), and a closer look at the video shows a sizeable piece of burning debris landing on top of Petitioner Reyna's left foot. Similarly, Petitioners seek to minimize the number of people threatened by the burning fragments by claiming that the public was separated from their protest by metal barricades; but Commander Regetz testified that those barriers, which were erected for a different purpose, did not actually succeed in fully segregating the protesters, and played a role in his decision to effect an arrest:

> It was the cumulative effect of the wind, the fact that people were walking in front along Ontario Street, some people actually cut through the demonstrations, and then when I saw the thing, the effigy burning and saw the distinct possibility that lit paper could be blowing around and could end up landing on somebody, that's what made my decision.

(Tr. 294.) And finally, Petitioners' assertion that "[o]ther than the effigies, there were no flammable objects in the area" (Pet. 8) conveniently omits the fact that another extremely combustible object – a can of charcoal-lighter fluid – was itself not only in the area, but placed by Petitioners in dangerously close proximity to the burning effigies.

It is with these facts in mind – and not the sanitized and inaccurate version in the Petition for Certiorari – that the Ohio Supreme Court found the *manner* with which these Petitioners engaged in the burnings to implicate the City's interest in public safety. Indeed, one of the Petitioners himself conceded on the stand that the situation that day created "a substantial risk of serious physical injury." (Tr. 225-26.) Contrary to Petitioners' assertions, therefore,

the issue presented in this case is not whether *any* effigy burnings – "no matter how small or brief the fire, no matter how minor the threat to public safety" (Pet. i) – implicate a governmental interest; rather, the issue is whether *these particular* effigy burnings do so, which makes it all the more incumbent on counsel to present this Court with an accurate and complete representation of the factual record.

Moreover, another part of Petitioners' legal argument is predicated on an incomplete or distorted characterization of the facts. Petitioners argued before the Ohio Supreme Court – as they do now – that Cleveland police officers had a duty to warn them that they might face arrest. Even if that were so – which the Ohio Supreme Court held that it was not – there is sworn testimony in the record that the City police did in fact warn them. Both Commander Regetz and Assistant Chief Schindler testified that they warned Petitioners about burning an effigy under the conditions present at the time. (Tr. 246, 289-90.) Petitioners ignored the warnings, burned the effigies, and even sprayed accelerant on the open flames; and when they did so, they were arrested.

Thus, despite Petitioners' efforts to sanitize and trivialize the danger posed by their actions, the facts in this case reveal that Petitioners engaged in conduct that jeopardized public safety. And it is their specific conduct – and not some hidden animus against effigy burnings in general – that led the Ohio Supreme Court to conclude that the City police officers were serving an important interest in preserving public safety when they arrested the Petitioners. After all, Commander did not arrest other protesters at the scene who lit on fire "three-by-five cards" of Chief Wahoo because "[he] didn't see a danger there."

(Tr. 389-90.) Because the Ohio Supreme Court correctly applied to the factual record before it this Court's well-settled principles in cases involving both speech and conduct, this litigation does not raise a federal question and this Court should deny the Writ.

II. This Court Should Deny The Writ Because The Decision Of The Ohio Supreme Court Implicitly Turned On An Interpretation Of A State Arson Law And Therefore Does Not Raise A Federal Question.

In their attempt to persuade this Court that the Ohio Supreme Court is actually opposed to all effigy burnings – "no matter how small or brief the fire, no matter how minor the threat to public safety" (Pet. i) – the Petitioners even go so far as to accuse the Ohio court of purposely misapplying the state's arson law and encouraging other judges to do so: "Under the Opinion, maintaining public order is so important that judges must defer even to the arrest of protesters under statutes that *do not apply* to their conduct." (Pet. 11 (italics in the original); *see also* Pet. 9 (Petitioners "were arrested under an aggravated arson statute that was not remotely applicable to the situation").) Putting aside, once again, that the Ohio Supreme Court never used the term "public order" and only referred to "maintaining order" when paraphrasing the facts in *Texas v. Johnson*, Petitioners' argument here proves too much: If this case is really about how to apply Ohio's arson law – and it is at least in part about that – then there is no federal question for this Court to review.

Certainly the two dissenting justices on the Ohio Supreme Court, whose opinions are quoted by the Petitioners, thought that this case turned on the proper

interpretation of Ohio's aggravated arson statute. If they thought instead, as Petitioners argue, that the majority opinion "effectively overrules" (Pet. 8) – or even misinterprets – *Texas v. Johnson*, then surely they would have mentioned (or cited to) that decision in their dissents. In truth, however, neither dissenter does so, and only one of them even cites to *United States v. O'Brien*. In telling contrast, however, both dissenting justices begin their opinions by quoting Ohio's arson statute which states in relevant part:

> (A) No person, by means of fire or explosion, shall knowingly do any of the following:
>
> (1) Create a substantial risk of serious physical harm to any person other than the offender.

Ohio Rev. Code § 2902.02 (Pet. App. 31), *quoted in* Pet. App. 8 (Moyer, C.J., dissenting); Pet. App. 10 (Pfeiffer, J., dissenting).

The gravamen of both dissenting opinions is that, on this record, "[e]ven though one might be concerned with the potential danger of burning effigies, there is no evidence that anyone *other than the protesters* [*themselves*] were placed in any risk of serious physical harm resulting from the appellees' conduct." (Pet. App. 9 (Moyer, C.J., dissenting) (emphasis added); *see also* Pet. App. 10 (Pfeiffer, J., dissenting) ("the record shows that burning pieces of the effigy landed near the protesters themselves, *not anyone else*") (emphasis added).)

On this matter of state law interpretation, however, the Ohio Supreme Court's majority opinion refused to take such a crabbed view of who qualifies to be protected from substantial risk of physical harm:

> Though appellees emphasize that they set the fire in a cordoned area devoid of flammable property, the police were obligated to protect *the public, including the protestors themselves*. A video of the effigy burnings and arrests is part of our record. It shows a protestor spraying accelerant on a burning effigy and then retreating from the rapidly growing fire before burning pieces of the disintegrating effigy began floating in the wind and landing in the proximity of the protestors. These facts implicate Cleveland's asserted interest in public safety.

(Pet. App. 5 (emphasis added).)

Moreover, there were other facts in the record which support the majority's concern for "the public['s]" safety, and not just the safety of the few Petitioners directly involved in the effigy burnings. For example, in the vicinity of the burning remnants were civilian "peacekeepers," members of the media, City police and fire personnel, protesters who did not participate in the burnings, and some baseball fans cutting through the demonstrations, including children.

Thus, what primarily caused the five justices in the majority to disagree with the two in dissent is another factual dispute about whether the only persons endangered by the effigy burnings that day were the ones exempted by Ohio's arson law, i.e., those who knowingly created a substantial risk of serious physical harm *only to themselves*. And that factual dispute is itself inextricably connected to the one between Petitioners and the Ohio Supreme Court about whether their actions that day implicated the City's interest in preserving public safety.

The Respondent respectfully submits that the Ohio Supreme Court correctly resolved both those factual

issues, but even if it did not do so, the petition for certiorari does not lie to correct a state supreme court's misapplication of either a state statute or "of a properly stated rule of law." S. Ct. Rule 10.

CONCLUSION

Since the Ohio Supreme Court's opinion in *Bellecourt v. Cleveland*, 104 Ohio St. 3d 439, 820 N.E.2d 309 (Ohio 2004) faithfully applied this Court's rulings in *Texas v. Johnson* and *United States v. O'Brien*, and turned on the court's specific findings of fact as well as its interpretation of Ohio's arson statute, this case raises no substantial federal question, and this Court should therefore deny Petitioners' request for review.

Dated: April 15, 2005.

Respectfully submitted,

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